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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1985

STEVEN OWEN,

Petitioner,

v.

JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY,

and

HON. JOHN B. POERSCH, as District Attorney of Schenectady County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR CERTIORARI

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Questions Presented

1. Whether, in a criminal case where four counts have been submitted to the jury, and mistrial has been declared without the court ascertaining whether the jury had decided that petitioner should be acquitted of one or more of the counts, retrial of the indictment is barred by the Double Jeopardy Clause.

2. Whether, in a vehicular homicide case that took two weeks to try, and the jury spent only six hours deliberating, there is "manifest necessity" permitting the court to grant a mistrial without double jeopardy prohibiting a retrial.

3. Whether the rule of "manifest necessity" announced in *United States v. Perez,* 9 Wheat. 579, 580 (1824) and adhered to on the basis of *stare decisis* in constitutional double jeopardy cases later decided by this Court should be reconsidered since *Perez* was not a constitutional double jeopardy case and the rule permits too much leeway in the trial court's exercise of discretion.

4. Whether the rule, announced in *Richardson v. United States*, 468 U.S. ____, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), "that the failure of the jury to reach a verdict is not an event which terminates jeopardy," should be reconsidered, since prior cases do not support the rule, and the rule eliminates all standards in determining whether a mistrial was properly declared on the basis of jury deadlock.

List of Parties to the Proceeding

In the New York Court of Appeals the parties were (1) "Steven Owen," the present petitioner, (2) "George Stroebel, Jr., as Schenectady County Court Judge," and (3) "John B. Poersch, as District Attorney of Schenectady County." Judge Stroebel has retired as County Court Judge; Hon. Clifford T. Harrigan has since been elected to that position but the present caption simply lists the "Judge of the County Court, Schenectady County" as a respondent.

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v.

JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY,

and

HON. JOHN B. POERSCH, as District Attorney of Schenectady County,

Respondents.

Petition for Writ of Certiorari to the New York Court of Appeals

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Steven Owen, the petitioner herein, prays that a writ of certiorari issue to review the order ("remittitur") of the

New York Court of Appeals entered in the above-entitled case on May 28, 1985.

Opinions Below

The opinion of the New York Court of Appeals is reported at 65 N.Y.2d 558, ____ N.Y.S.2d ____ and is printed in Appendix A hereto, *infra*, page 1a. The order (remittitur) of the New York Court of Appeals is printed in Appendix B hereto, *infra*, page 1b. The order of the Appellate Division, Third Department, entered upon the remittitur, is printed in Appendix C hereto, *infra*, page 1c.

The opinion of the Appellate Division, Third Department is reported at 102 A.D.2d 651, 479 N.Y.S.2d 874, and is printed in Appendix D hereto, *infra*, page 1d. The order of the Appellate Division, Third Department is printed in Appendix E hereto, *infra*, page 1e.

Jurisdiction

The order (remittitur) of the New York Court of Appeals (Appendix B, *infra*, page 1b) was dated and entered on May 28, 1985. The order of the Appellate Division, Third Department (Appendix C, *infra*, page 1c) was dated and entered on June 5, 1985. This petition is timely pursuant to Rule 20.2 and 28 U.S.C. § 2101(c), since it is filed within ninety days after entry of the judgment or decree under review. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Involved

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Statement of Case

This is a proceeding seeking an order in the nature of a writ of prohibition under New York C.P.L.R. Article 78, upon the ground of double jeopardy. Petitioner was brought to trial in County Court, Schenectady County in October, 1981 on Indictment No. 181-40. He was charged with manslaughter in the second degree, criminally negligent homicide, assault in the second degree, and assault in the third degree, all stemming from a 1980 automobile accident in which a passenger was killed. The trial commenced October 19, 1981 and did not go to the jury until October 30, 1981.

The criminal case involved not only witnesses to the auto accident, but expert testimony of accident reconstruction specialists testifying on behalf of the prosecution and defense. Three persons were in the car in which petitioner was riding. One was killed. The third testified that petitioner was the driver. Petitioner's contention was that the third person was the driver. No one not riding in the car had seen who was driving it.

The trial transcript is more than 1000 pages. Evaluation of the case necessarily required examining photographs, models and other exhibits, in addition to weighing the credibility of the fact witnesses and assessing the reconstructions of the expert witnesses. This was not a simple task.

After only six hours of deliberation the jury was discharged when Judge Stroebel suddenly declared a mistrial. The court only spoke with two of the jurors before declaring a mistrial, and did not question the foreman or poll the jury as to whether petitioner had been acquitted of any of the four counts. Judge Stroebel did not ask for comments or consultation with counsel for either side before declaring the mistrial. Petitioner did not request a mistrial and did not consent to the mistrial.

The minutes of the final portion of the trial, showing the time the case went to the jury, the jury's subsequent requests for reading of testimony and clarification of legal principles, and the discharge of the jury, are reproduced in Appendix G, *infra*, page 1g.

Subsequently the Schenectady County District Attorney sought to retry petitioner on the same indictment. Petitioner moved for dismissal of the indictment on grounds, *inter alia*, of constitutional double jeopardy and right to a speedy trial. Judge Stroebel denied the motion.

Petitioner thereupon commenced a proceeding under New York Civil Practice Law and Rules, Article 78, seeking a order in the nature of a writ of prohibition. The petition raised issues under the Fifth Amendment to the U.S. Constitution in paragraph 11, which states, *inter alia*:

"11. I respectfully urge that a judgment of prohibition be issued, and that the indictment be dismissed, upon the grounds

"(A) that to re-try me would be to subject me to double jeopardy, since

"(1) there was no 'manifest necessity' for the declaration of mistrial,

* * *

"(3) the jury was not polled, and there is no way to tell whether there was agreement upon a partial verdict which may have included acquittal of one or more of the counts submitted for the jury's consideration,"

The petition is reproduced in Appendix F, *infra*, page 1f.

The Fifth Amendment and decisions of this and other courts construing the Double Jeopardy Clause of that Amendment were cited in the briefs to the Appellate Division and the New York Court of Appeals.

The Appellate Division unanimously granted the petition, with an opinion by Presiding Justice Mahoney (Appendix D, *infra*, page 1d).

The District Attorney appealed to the New York Court of Appeals which unanimously reversed and dismissed the petition (one judge did not take part) (Appendix A, *infra*, page 1a).*

*No appearance was made in the Court of Appeals on behalf of the Judge of the Schenectady County Court.

Petitioner is again subject to retrial unless the present application is granted and the order of the New York Court of Appeals is reversed.

REASONS FOR GRANTING WRIT

1. The decision below conflicts with the decisions of other States' highest courts as to whether there can be retrial of a multicount indictment when the jury was not polled on each count before discharge.

Petitioner argued in the courts below that he could not be retried without violation of the Double Jeopardy Clause because the trial court never inquired, and the jury did not volunteer, whether a verdict had been reached on any of the four counts submitted. The Appellate Division, Third Department recognized this argument in its decision granting the petition; the New York Court of Appeals did not mention the issue, impliedly finding that the issue presented no violation of double jeopardy.

The Double Jeopardy Clause embodies principles of collateral estoppel: the prosecution may not relitigate issues of fact decided in the defendant's favor in a previous prosecution (*Ashe v. Swenson,* 397 U.S. 436 [1970]; *see United States v. Larkin,* 605 F.2d 1360, reh'g granted in part, 611 F.2d 585 [5th Cir. 1979], cert. denied, 446 U.S. 939 [1980]).

The Double Jeopardy Clause replaces the common law plea of autrefois acquit; the constitutional provision unequivocally prohibits a second trial following an acquittal (*Arizona v. Washington,* 434 U.S. 497, 503 [1978]); *United States v. Scott,* 437 U.S. 82, 87 [1978]; *see* Sigler, *Double Jeopardy* [1969], p 33).

This policy has led the highest courts of several states to hold that when a defendant is charged with more than one count, and the jury appears deadlocked, it must be polled to determine if the jury has reached agreement acquitting the defendant of any of the counts (*see Stone v. Superior Court,* 31 Cal.3d 503, 646 P.2d 809, 183 Cal.Rptr. 647 [1982]; *State v. Pugliese,* 120 N.H. 728, 422 A.2d 1319 [1980]; *O'Kelly v. State,* 94 N.M. 74, 607 P.2d 612 [1980]; *State v. Castrillo,* 90 N.M. 608, 566 P.2d 1146 [1977]; *but see A Juvenile v. Commonwealth,* 392 Mass. 52, 465 N.E.2d 240, 243 n. 2 [1984]; *Doe v. Donovan,* 747 F.2d 42, 44 n. 1 [1st Cir. 1984]).

When multiple counts are submitted for the jury's consideration, including lesser-included counts, it is entirely possible for the jurors to reach agreement on one or more of the counts, but fail to agree on all of them, and simply inform the trial judge that they had failed to come to a conclusion. Without inquiry, it is not possible to know whether the jury has, in fact, found that the defendant should be acquitted of one or more of the charges.

If the jury has found that the defendant should be acquitted of one or more charges, the defendant should not be retried on those charges. Yet, absent inquiry from the trial court, it may not be known whether or not there was a partial acquittal. Retrial of any of the counts under such circumstances violates the Double Jeopardy Clause.

In *Pugliese, supra,* 422 A.2d at 1320-1321, the Supreme Court of New Hampshire posed the issue thusly: "The questions on the double jeopardy issue are whether, without first inquiring what the jury had in fact done, there was a 'manifest necessity' to declare a mistrial or whether the ends of justice would otherwise be defeated if the trial court failed to discharge the jury."

In *Castrillo, supra,* 566 P.2d at 1151, the Supreme Court of New Mexico observed that "[t]here is no plain and obvious reason to declare a mistrial as to any included offense upon which the jury has reached a unanimous agreement of acquittal."

To ask the jury whether it has reached a verdict of acquittal on any of the counts submitted is a simple task and cannot defeat the ends of justice. Where, as in the criminal case in question here, there is the possibility that there has been a partial acquittal, the defendant has a right to know of that acquittal so that he cannot be retried having once been acquitted.

In petitioner's trial there was no opportunity for defense counsel to request polling of the jury. The trial court abruptly declared a mistrial, without consulting with counsel for either side.

The issue presented by petitioner was not decided last year in *Richardson v. United States,* 468 U.S. ____, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). In that case the defendant had twice moved unsuccessfully for judgment of acquittal on the ground of insufficient evidence. The jury acquitted Richardson on one count but was unable to reach a verdict on the two remaining counts and declared a mistrial on those counts. The case reached this Court upon review of an order concerning a motion for acquittal in the second trial.

Thus in *Richardson* the trial court knew that the jury had reached a verdict of acquittal on one of the counts but had not been able to reach a verdict on the remaining counts. In the present case we do not know if the jury reached a verdict of acquittal on any of the counts. Had

there been an announcement in open court as to the jury's status with regard to each count, the issue would not be presented.

Absent an authoritative direction from this Court that the jury must be polled on each count before declaration of mistrial, defendants will continue to be subject to retrial when they may have already been acquitted on one or more of the charges.

This issue is an important one upon which this Court has not yet spoken. The issue will naturally recur as mistrials are declared upon jury deadlock without the court polling the jury.

National uniformity is important in such an issue. There should be no difference in resolution of this issue depending upon which state is the forum for the trial. The conflict between different states justifies the grant of certiorari to review the order below.

2. The decision below raises significant and recurring problems concerning the interpretation of the phrase manifest necessity" permitting declaration of mistrial.

The State and Federal courts have varied widely over how much deliberation is required before a jury can be discharged and a retrial had that does not violate the Double Jeopardy Clause.

This Court has stated that it is permissible under the Fifth Amendment to retry a case if there was "manifest necessity" for the mistrial, and that failure of the jury to agree on the verdict was an instance of "manifest necessity" (*Richardson v. United States,* 468 U.S. ____, 104

S.Ct. 3081, 82 L.Ed.2d 242 [1984]; *see Oregon v. Kennedy,* 456 U.S. 667 [1982]; *Arizona v. Washington,* 434 U.S. 497, 505 [1978]; *United States v. Perez,* 9 Wheat. 579, 580 [1824]).

In the present case the trial had lasted two weeks and the jury deliberated only about six hours. The Appellate Division, Third Department—a court not known for being soft on criminal defendants—unanimously held that here the time spent deliberating was not extensive, the inquiry by the trial court failed to ascertain whether an agreement was declared without the defendant's consent. Accordingly, it was an abuse of discretion to declare a mistrial, there was no "manifest necessity" and the Double Jeopardy Clause forbade a retrial.

The New York Court of Appeals unanimously reversed, essentially stating that the trial court had extremely broad discretion which the appellate courts would not disturb.

In contrast there are cases such as *United States v. Hoyt,* 620 F.2d 5 (1st Cir. 1980), where the jury had been discharged after seeming deadlocked following hours of deliberation concerning a brief (apparently one day) trial. The Court of Appeals observed that "[t]he fact that the jury seemed deadlocked over a single issue after four hours did not mean that another shot at reaching agreement was manifestly doomed to failure. Both in acting without hearing counsel, and in the decision itself, the court downplayed a fundamental right of the defendant" (620 F.2d at 7).

Similarly, in *United States ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975), the court

held that deliberation of some six and a half hours was insufficient before declaration of a mistrial in a case that had taken about two weeks to try. In *United States v. Gordy,* 526 F.2d 631, 636 (5th Cir. 1976), after a brief trial the jury had deliberated a total of only about five and a half hours before the foreman announced the jury was deadlocked. The Court of Appeals found no manifest necessity for declaring a mistrial had been demonstrated. *See also United States ex rel. Russo v. Superior Court of New Jersey,* 483 F.2d 7, 17 (3d Cir.), cert. denied, 414 U.S. 1023 (1973).

There are no standards for determining when there is "manifest necessity." The determination of that question should not rest solely in the discretion of the trial judge, or else the test is no test at all and the judge is free to do as he or she wishes without the possibility of effective review. The decision of the New York Court of Appeals in this case abandons the effort to review a judge's exercise of discretion in declaring a mistrial due to jury deadlock. Constitutional rights cannot be left to the discretion of a single judge, with no review possible.

While it may be true that no mechanical formula is desirable or possible, it is certainly true that the absence of a reviewable standard is undesirable. As in other areas of constitutional law where this Court has devised formulations to guide the bench and bar, standards should be announced for when there is "manifest necessity" to discharge a jury before it has reached a verdict.

3. The Court should reconsider the "manifest necessity" rule; scholarship has shown that it comes from a case that did not deal with the Double Jeopardy Clause and experience has shown that the rule is inappropriate.

This Court has held, based upon *United States v. Perez*, 9 Wheat. 579 (1824), that a jury may properly be dismissed, and a new trial had without violation of double jeopardy, if "there is a manifest necessity for the act."

Recent scholarship has shown that the *Perez* case has been misconstrued and should not be regarded as a constitutional double jeopardy case. In "Retrial After a Hung Jury: the Double Jeopardy Problem" (Findlatter, 129 U. Pa. L. Rev. 701 [1981]), the author points out that the *Perez* decision nowhere mentions double jeopardy or the Fifth Amendment. That is because in 1824 this Court adhered to the English common law view that jeopardy does not attach until a verdict is rendered (*id.* at 703).

In *Perez* this Court simply applied the old common law rule that permitted retrial since no verdict had been rendered.

In this century the view developed that jeopardy attached when a jury is impaneled and sworn (*id.* at 709-710). That new rule raises a new question: the effect of the Double Jeopardy Clause on the retrial of a case when mistrial is declared before verdict. That question did not exist when *Perez* was decided and the "manifest necessity" doctrine that has developed with *Perez* as its antecedent has no proper basis. *Perez* did not consider constitutional questions and should not be the underpinning for an important rule of constitutional law.

As the author of the above-cited article shows, a defendant in a case where the jury apparently becomes deadlocked is "more likely to be innocent than is the run-of-mine accused" (*id.* at 736). The risk borne by a criminal defendant facing a retrial, where the prosecution can seek to counter and defuse the proof put in by the defense at the first trial, is far greater than the risk to society if a guilty defendant is set free because a jury could not agree. Declaration of mistrial upon the ground of jury deadlock should not be made unless there is a very stringent showing that the jury has had more than ample time to consider all the evidence, employing the proper rules of law.

Reconsideration of the *Perez* rule should lead to establishment of a more rigorous rule not subject to so much variation at the hands of individual trial and appellate courts (*see* Schulhofer, Jeopardy and Mistrials, 125 U. Pa. L. Rev. 449, 487 [1977]). Professor Schulhofer suggests a "strict necessity" standard. He observes that mistrial after all the evidence has been presented "involves acute possibilities for prejudice to the defendant. Indeed, in some cases the judge's diligence in seeking a verdict could have been affected by his or her sense of how well the trial has gone for the prosecution" (*id.* at 522-523). An objective standard is needed.

By any reasonably objective standard, the period of deliberation in the present case was insufficient. This petition should be granted so that constitutional standards for declaration of a mistrial not violating the Double Jeopardy Clause can be established.

4. The Court should reconsider its holding in *Richardson v. United States* that the failure of the jury to reach a verdict is not an event which terminates jeopardy.

Rejecting the petitioner's double jeopardy claim in *Richardson v. United States,* 468 U.S. ____, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), this Court held that the argument of double jeopardy was not available because he was not again being subjected to jeopardy; jeopardy had attached but not terminated when the jury failed to reach a verdict. This conclusion was said to be based on the authority of *United States v. Perez,* 9 Wheat. 579 (1824) and *Justices of Boston Municipal Court v. Lydon,* 466 U.S. ____, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984). However those cases do not support the rule announced in *Richardson* and do not point to the radical results the rule could permit.

For the reasons discussed above, *Perez* is not good authority for the Court's conclusion. The *Perez* decision does not mention either the Fifth Amendment or double jeopardy. But, even more important, *Perez* does not give the trial court unfettered discretion to terminate the jury's deliberations at any time without double jeopardy consequences. In *Perez* this Court imposed the restrictions that the jury could be discharged before giving a verdict whenever "taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Richardson* imposes no similar limitation.

Lydon is concerned with the peculiarities of the Massachusetts two-tier trial system, in which a defendant unsatisfied with the result after an initial bench trial may have a trial *de novo* instead of a normal appeal. This

Court observed that in the first trial Lydon was in "jeopardy" only in a theoretical sense. Once the right to a trial *de novo* is exercised, the judgment at the bench trial is wiped out. There had been a completed trial, but its result is subject to being ignored at the discretion of the defendant. This is certainly different than the situation, presented in *Richardson* as well as in the present case, where a jury does not reach a verdict before being discharged. *Lydon's* discussion of "continuing jeopardy" does not lead to *Richardson's* holding.

The consequences of this Court's statement in *Richardson* that "the failure of the jury to reach a verdict is not an event which terminates jeopardy" go far beyond what was involved in that case. The holding eviscerates even the "manifest necessity" test of *Perez*. Under *Richardson* a judge could discharge the jury *sua sponte* the first time the jury returns to the courtroom with a question. Since the jury has been discharged without reaching a verdict, jeopardy continues and there can be a new trial. Indeed, the judge could discharge the jury merely because it has not reached agreement before the judge wishes to go home. Under *Richardson* such an abuse of judicial power would be unchallengeable.

It is certainly questionable whether this Court intended such results by its holding in *Richardson*. This Court has not hesitated to declare even recently decided cases wrongly decided when, in retrospect, it appears that they have consequences and emphasis not originally intended (*see, e.g., United States v. Scott,* 437 U.S. 82, 86-87 [1978]). The Court should take the opportunity presented by the case at bar to reconsider *Richardson*.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 16, 1985

Appendix A—Opinion of New York Court of Appeals, Dated May 28, 1985.

COURT OF APPEALS

STATE OF NEW YORK.

No. 222

IN THE MATTER

OF

STEVEN OWEN,

Respondent,

v.

GEORGE W. STROEBEL, JR., &c.,

Respondent,

JOHN B. POERSCH, as District Attorney of Schenectady County,

Appellant.

JOHN B. POERSCH, DA, Schenectady County (Thomas W. Hefferon of counsel) for appellant.

Robert M. Cohen, Ballston Lake, & E. Stewart Jones, Jr., Troy, for respondent.

Memorandum.

The judgment of the Appellate Division should be reversed, and the petition dismissed.

Petitioner was brought to trial on homicide and assault charges stemming from an automobile accident in which a passenger in the car was killed. The essential question at trial was whether petitioner or the third occupant of the car, Michael Dougherty, was the driver. Testifying for the prosecution, Dougherty claimed that petitioner was driving; testifying for the defense, petitioner's sister claimed that she saw petitioner in the passenger seat when the car left home.

Each side supported its position with additional evidence, including the testimony of accident reconstruction experts. Though the trial was conducted over a period of ten days, the parties disagree as to the time actually spent on the presentation of evidence. The transcript, including a Sandoval hearing, preliminary instructions, openings, summations, the charge, supplemental instructions, and exchanges with the jury, consumed approximately 1200 pages.

The jury commenced deliberations at 3:00 p.m. on October 30, 1981. Two hours later, the jurors informed the court that they could not agree. The court then gave an *Allen*-type charge (*Allen v. United States*, 164 US 492; 1 CJI 42.60), reminding the jurors of their oaths and instructing them to make every effort to resolve their differences and arrive at a verdict, and deliberations resumed. Over the next several hours, the jury requested a reading of portions of the testimony, asked questions which were answered by the court, and took a dinner break. At 10:30 p.m., the court declared a recess and sequestered the jury overnight. Deliberations resumed the next morning at 9:30 a.m., interrupted twice for further

instructions requested by the jury. At 11:20 a.m., the jury again announced its inability to come to a conclusion. Addressing the jurors, the court asked whether there was "any possibility" of reaching a verdict by further deliberations and review of the evidence. One juror responded, "I don't think things can be reasoned out. It's beyond reasoning. We have taken everything and dissected it." Another juror said, "The same way we stood when we walked in at 4:00 o'clock. We stand that way." Although the court did not question each juror, none expressed a contrary view. The court then declared a mistrial, stating: "Well, if you're positive that there's no possibility of reaching a verdict I'll declare a mistrial. I'll discharge the jury and replace the case on the ready calendar for retrial at the earliest opportunity."

When faced with a retrial, petitioner moved to dismiss the indictment on double jeopardy grounds, but the court denied the motion. Petitioner then commenced this Article 78 proceeding in the Appellate Division to prohibit further prosecution. That court granted the petition, finding the trial court's mistrial declaration after six hours of deliberation an abuse of discretion. We disagree.

As we recently stated, "The decision to declare a mistrial necessarily rests in the broad discretion of the Trial Judge * * * who is best situated to take all circumstances into account and determine whether a mistrial is in fact required in a particular case" (*Matter of Plummer v. Rothwax*, 63 NY2d 243, 250). In *Plummer*, we found no abuse of discretion in the court's discharge of a jury 6½ hours hours after submission (4½ hours of actual deliberation time), upon the jury's first announcement of its inability to reach a verdict. We noted the impossibility of applying a mechanical formula and stressed the importance of considering all the circumstances.

Although the proceedings here lasted significantly longer than in *Plummer*, the number of hours of trial or deliberations cannot be viewed in isolation. Other circumstances support the trial judge's action and preclude treating the mistrial declaration as an abuse of discretion as a matter of law. Resolution of the primary issue, the identity of the driver, in large measure turned on the jury's evaluation of the credibility of the prosecution's chief witness, a task not necessarily complex but one where "a jury could shortly become deadlocked" (*Matter of Plummer v. Rothwax*, 63 NY2d 243, 251, *supra*). Further, when the jury first said it was deadlocked, the court refused to accept this conclusion and firmly lectured the jurors on the importance of reaching a verdict and reconciling differences if at all possible. The court declared a recess for the day, thereby allowing the jurors additional time to reflect on the evidence and approach deliberations with fresh perspective. When the jury expresed its irreconcilable disagreement for a second time, again the court asked the jury as a whole whether there was any possibility of rendering a verdict. Receiving an explicit negative response from two jurors, and not a word of disagreement from the others, the court was justified in concluding that unanimity was unlikely within a reasonable amount of time (CPL 310.60).

Accordingly, under all the circumstances, the court did not abuse its discretion in discharging the jury and setting the case down for a retrial.

Judgment reversed, without costs, and petition dismissed in a memorandum. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur. Judge Titone took no part.

Decided May 28, 1985

Appendix B—Remittitur of the New York Court of Appeals, Dated May 28, 1985.

COURT OF APPEALS

STATE OF NEW YORK.

The Hon. Sol Wachtler, Chief Judge, Presiding

No. 222

IN THE MATTER

OF

STEVEN OWEN,

Respondent,

v.

GEORGE W. STROEBEL, JR., &c.,

Respondent,

JOHN B. POERSCH, as District Attorney of Schenectady County,

Appellant.

The appellant in the above entitled appeal appeared by Hon. John B. Poersch, District Attorney, Schenectady

County; the respondent appeared by E. Stewart Jones, Jr., Esq.

The Court, after due deliberation, orders and adjudges that the judgment is reversed, without costs, and petition dismissed in a memorandum. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur. Judge Titone took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Third Department, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 28, 1985.

(SEAL)

Appendix C—Order of the Appellate Division, Third Department, Dated June 5, 1985.

At a Term of the Appellate Division of the Supreme Court held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 20th day of May, 1985.

Present:

Hon. A. Franklin Mahoney,
Presiding Justice.
Hon. T. Paul Kane,
Hon. Paul J. Yesawich, Jr.,
Hon. Howard A. Levine,
Hon. Norman L. Harvey,
Associate Justices.

IN THE MATTER
OF

STEVEN OWEN,

Respondent,

vs.

GEORGE W. STROEBEL, JR., as Schenectady County Court Judge,

Respondent,

JOHN B. POERSCH, as District Attorney of Schenectady County,

Appellant.

Appellate Division Docket No. 47316

The appellant in the above-entitled proceeding having appealed to the Court of Appeals from a judgment of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the clerk on August 27, 1984, and the Court of Appeals (Titone, J., not taking part), after due deliberation, having reversed the judgment, without costs, and having dismissed the petition and having further ordered that the record and proceedings in the Court of Appeals be remitted to this court to be proceeded upon according to law, and the remittitur of the Court of Appeals having been filed in this court, it is hereby

ADJUDGED that the order of the Court of Appeals be, and the same hereby is, made the order of this court; and it is further

ADJUDGED that the judgment of the Appellate Division so appealed from be, and hereby is, reversed, without costs; and it is further

ADJUDGED that the petition be, and hereby is, dismissed.

ENTER:

/s/ MICHAEL J. NOVACK
Clerk

Dated and Entered: June 5, 1985

A true copy:

MICHAEL J. NOVACK
Clerk

Appendix D—Opinion of Appellate Division, Third Department, Dated July 26, 1984.

102 A.D.2d 651, 479 N.Y.S.2d 874

IN THE MATTER

OF

STEVEN OWEN,

Petitioner,

v.

GEORGE W. STROEBEL, JR., as Schenectady County Court Judge, *et. al.*,

Respondents.

Supreme Court, Appellate Division, Third Department.

July 26, 1984.

E. Stewart Jones, Troy (Robert M. Cohen, Ballston Lake, of counsel), for petitioner.

Robert Abrams, Atty. Gen., Albany (Peter G. Crary, Asst. Atty. Gen. and William J. Kogan, Albany, of counsel), for George W. Stroebel, Jr., respondent.

John B. Poersch, Dist. Atty., Schenectady (Alfred D. Chapleau and John R. Polster, Schenectady, of counsel), respondent *pro se*.

Before Mahoney, P.J., and Kane, Yesawich, Levine and Harvey, JJ.

MAHONEY, Presiding Justice.

Petitioner was indicted for the crimes of manslaughter in the second degree, criminally negligent homicide, assault in the second degree and assault in the third degree. All charges arose out of an August 24, 1980 automobile accident in which it was alleged that petitioner was the operator of a vehicle which caused the death of one passenger and the serious injury of another.

The trial of the case commenced on October 16, 1981 before respondent George W. Stroebel, Jr., Schenectady County Court Judge, and continued to October 30, 1981, when the case was submitted to the jury. After deliberating for approximately two hours, the jurors returned to the courtroom and the forelady reported that the jurors could not agree. The court gave additional instructions. Thereupon, the jury resumed deliberation for a brief period only to return to the courtroom with a request that certain testimony be read to them. When this process was repeated, the court, at 10:30 P.M., suspended deliberations and sequestered the jury for the night, directing that deliberations be resumed the following day at 9:30 A.M. At 11:20 A.M. on October 31, 1981, the jury once more returned to the courtroom and reported "this jury is deadlocked, and we cannot come to a conclusion". After a general inquiry as to whether further deliberation would be fruitful, which elicited a negative response from the jurors, the court without determining if the jury had reached a decision as to any of the four counts of the indictment, without polling the jury, and without consent of either the prosecutor or defense counsel, *sua sponte* declared a mistrial. The total time of deliberation by the jury was approximately six hours.

When the People announced they were ready to retry petitioner, he moved to dismiss the indictment upon the grounds of (1) double jeopardy, (2) violation of petitioner's constitutional right to a speedy trial, and (3) in the furtherance of justice. On January 18, 1984, respondent Stroebel denied the motion and directed the District Attorney to reschedule the case for trial at the earliest possible time. Petitioner commenced this CPLR article 78 proceeding in the nature of prohibition in this court pursuant to CPLR 506.*

It is a fundamental principle of our constitutional system that a defendant may not be placed twice in jeopardy for the same offense (US Const., 5th Amdt.; NY Const., art. I, §6). This broad constitutional prohibition has been statutorily tailored to address the issue presented by this case, i.e., when the court may discharge a deliberating jury before rendition of a verdict without offending both the Constitution and the statute. Paragraph (a) of subdivision 1 of section 310.60 of the CPL provides that a deliberating jury may be discharged by the court only when "[t]he jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time". Clearly a court discharge of a deadlocked or "hung" jury can be justified

*While respondent Stroebel concedes that the issue of double jeopardy is cognizable by way of prohibition, he takes no position on its merits since this criminal matter is still pending before him. Respondent John B. Poersch, the District Attorney, makes a similar concession with respect to the issue of double jeopardy, but joins with respondent Stroebel in the view that the extraordinary remedy of prohibition does not lie to collaterally review statutory or constitutional speedy trial issues or interest of justice motions. We agree (see *Matter of Lopez v. Justices of the Supreme Ct. of N.Y. County*, 36 N.Y.2d 949, 373 N.Y.S.2d 552, 335 N.E.2d 857; *Matter of Scranton v. Supreme Ct. of State of N.Y.*, 36 N.Y.2d 704, 366 N.Y.S.2d 417, 325 N.E.2d 876; *Matter of Blake v. Hogan*, 25 N.Y.2d 747, 303 N.Y.S.2d 505, 250 N.E.2d 568).

only when the jury has deliberated for an *extensive* period of time without agreeing on a verdict on any count and the court is satisfied that agreement is *unlikely* within a *reasonable* time. Here, the jury, in a serious case, had deliberated only about six hours, had not been polled concerning any one of the four counts submitted for their consideration, and was discharged by the court when only two of the 12 jurors responded negatively to the court's general inquiry if additional time would be helpful. While definitions of "extensive" and "reasonable" depend on the complexity of each case, the double jeopardy implications, evoking both Federal and State constitutional issues as well as statutory concerns, should incline a court to favoring more and more time and more and more opportunity without becoming oppressive or compelling a verdict (see Bellacosa, Practice Commentary, McKinney's Cons. Laws of NY, Book 11A, CPL 310.60, p. 674). While the Trial Judge is in the best position to determine whether a mistrial is necessary in a particular case, and deference should be accorded to his decision to declare a mistrial (*People v. Michael*, 48 N.Y.2d 1, 9, 420 N.Y.S.2d 371, 394 N.E.2d 1134; *Matter of Napoli v. Supreme Ct. of State of NY*, 33 N.Y.2d 980, 353 N.Y.S.2d 740, 309 N.E.2d 137, affg. on opn. below 40 A.D.2d 159, 338 N.Y.S.2d 721, cert. den. 417 U.S. 947, 94 S.Ct. 3073, 41 L.Ed.2d 668), we nevertheless conclude that where, as here, the time spent deliberating by the jury was not extensive, the inquiry by the court failed to ascertain whether an agreement would be likely within a reasonable time and the mistrial was declared without defendant's consent, it was an abuse of discretion to declare a mistrial.

Where a court declares a mistrial without obtaining the defendant's consent, the double jeopardy provisions of both our State and Federal Constitutions prohibit retrial for the same crime unless " 'there is a manifest necessity

for [the mistrial], or the ends of public justice would otherwise be defeated' " (*People v. Michael, supra,* 48 N.Y.2d p. 9, 420 N.Y.S.2d 371, 394 N.E.2d 1134, quoting *United States v. Perez,* 9 Wheat. [22 U.S.] 579, 580, 6 L.Ed. 165). No showing of manifest necessity was made herein.

The petition should be granted, and respondents should be prohibited from prosecuting petitioner with respect to the incident underlying Indictment No. 181-40.

Petition granted, without costs, and respondents are prohibited from prosecuting petitioner with respect to the incident underlying Indictment No. 181-40.

Kane, Yesawich, Levine and Harvey, JJ., concur.

Appendix E—Order of Appellate Division, Third Department, Dated August 27, 1984.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building, in the City of Albany, commencing on the 29th day of May, 1984.

Present:

Hon. A. Franklin Mahoney,
Presiding Justice
Hon. T. Paul Kane
Hon. Paul J. Yesawich, Jr.
Hon. Howard A. Levine
Hon. Norman L. Harvey
Associate Justices.

IN THE MATTER

OF

STEVEN OWEN,

Petitioner,

v.

GEORGE W. STROEBEL, JR., as Schenectady County Court Judge, *et al.*,

Respondents.

The above-named Petitioner having instituted this CPLR Article 78 proceeding in this Court pursuant to

CPLR 506 (subdivision [b], paragraph 1) to prohibit the Respondents from retrying the Petitioner on an Indictment charging him, *inter alia,* with the crime of Manslaughter in the Second Degree;

NOW, on reading and filing the Notice of Motion and Petition sworn to on the 22nd day of February, 1984 and the Answer of the Respondent, George W. Stroebel, Jr., sworn to on the 7th day of March, 1984, and the Answer of the Respondent, John B. Poersch, sworn to on the 8th day of March, 1984, and the said proceeding having been presented during the above-stated Term by Robert Cohen, Esq., of counsel to E. Stewart Jones, Jr., Esq., Attorney for the Petitioner, and by Peter Crary, Esq., of counsel to Robert Abrams, Esq., Attorney for the Respondent, Schenectady County Court Judge George W. Stroebel, Jr., and John R. Polster, Esq., of counsel to John B. Poersch, District Attorney of Schenectady County, Attorney for the Respondent, John B. Poersch, and after due deliberation, and the Court having rendered a decision on the 26th day of July, 1984, it is hereby

ORDERED that the Petition be granted without costs and the Respondents are prohibited from prosecuting the Petitioner with respect to the incident underlying Indictment 181.40.

Enter:

/s/ MICHAEL J. NOVACK
Clerk

Dated and Entered: August 27, 1984.

A True Copy
MICHAEL J. NOVACK
Clerk

Appendix F—Petition for an Order of Prohibition.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

OF

The Application of STEVEN OWEN,

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules for an Order of Prohibition

against

HON. GEORGE W. STROEBEL, JR., as Schenectady County Court Judge, and HON. JOHN B. POERSCH, as District Attorney of Schenectady County,

Respondents.

Indictment # 181-40

TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT:

The petition of Steven Owen respectfully alleges:

1. I am the petitioner in the above-captioned proceeding.

2. I was indicted by the Grand Jury of Schenectady County, in Indictment No. 181-40, with regard to an incident that occurred August 24, 1980, when an automobile left the roadway of I-890 in the Town of Rotterdam, resulting in the death of one of the occupants of the car, and injuries to another. A copy of the indictment is annexed hereto as Exhibit A. The indictment has four counts: Manslaughter in the Second Degree, Criminally Negligent Homicide, Assault in the Second Degree, and Assault in the Third Degree.

3. I was tried on that indictment before respondent, the Hon. George W. Stroebel, Jr., Schenectady County Court Judge, and a jury, in October, 1981. Selection of the jury commenced on October 16, 1981 and was completed on October 19, 1981. Trial commenced on the latter date and the case was submitted to the jury on October 30, 1981, with deliberations commencing at 3:00 p.m. that date (T 1125 [pages cited are annexed hereto collectively as Exhibit B]). After less than two hours of deliberation the jury returned to the court room at 5:00 p.m. and informed the court that it could not agree (T 1125). The jury received supplemental instructions (T 1125-1128) and returned to the court room with a question at 5:45 p.m. (T 1129). After informing the court of the portions of testimony it wished to hear again, the jury was sent to dinner and then resumed its deliberations at 7:30 p.m. (T 1129-1132). At 8:35 p.m. selected portions of the trial testimony were read to the jury (T 1132-1134); additional questions were asked by jurors (T 1134-1135), and the jury resumed its deliberations. At 9:35 p.m. the jury came back to the court room for the reading of additional testimony (T 1137) and again resumed deliberations. At 10:30 p.m. the court, without

questioning the jury with regard to any possible deadlock, sent the jury to a motel for the night (T 1138).

4. Deliberations resumed on October 31, 1981 at 9:30 a.m. (T 1142). The jury returned to the court room with more questions at 9:55 p.m. (T 1142). After additional instructions (T 1142-1144) the jury again continued deliberations (T 1144). The jury was brought back to the court room for corrective instruction, then deliberations continued (T 1145-1146). At 11:20 a.m. the jury returned and the following took place:

> The Court: * * * Madam Forelady, I have a note from you here which states, "This jury is deadlocked, and we can't come to a conclusion." Do you feel in your own minds that there is any possibility that you can reach a conclusion? I want to be sure of that now because if there is a possibility if you think by further deliberations reviewing the evidence and the law and reasoning together that you can come to a verdict I want you to tell me now.
>
> Juror No. 5: I don't think things can be reasoned out. It's beyond reasoning.
>
> The Court: There are certain measures that are beyond reasoning with?
>
> Juror No. 5: Exactly.
>
> Juror No. 8: The same way we stood when we walked in at 4:00 o'clock. We stand that way. We have taken everything and dissected it. I think I'm a lawyer now.
>
> The Court: Well, if you're positive that there's no possibility of reaching a verdict I'll declare a mistrial. I'll discharge the jury and replace the case on the ready calendar for retrial at the earliest op-

portunity. All right, ladies and gentlemen. Thank you very much for your services, and I thank you on behalf of myself and the County of Schenectady and the parties involved too. You're discharged, and you may return home. Thank you very much.

I'll continue the defendant on bail, place the case on the ready calendar for retrial.

(The jury was excused)

(Whereupon the proceedings were concluded) (T 1147-1148)

5. The foregoing occurred after only about 6 hours of deliberation concerning a trial which had lasted 2 weeks, involving testimony which fills a thousand pages of transcript. Neither I nor my attorney consented to the declaration of mistrial.

6. Although the case was supposed to be placed on the ready calendar "for trial at the earliest opportunity", it still was not reached for retrial for more than a year. I was finally notified to appear on January 4, 1983. The attorney who had represented me at the 1981 trial, Paul Cheeseman, Esq., had in the interim been elected to the position of Albany County Family Court Judge, and I retained E. Stewart Jones, Jr., Esq. as new counsel. On January 4, 1983 Assistant District Attorney John R. Polster, acting on behalf of respondent, Hon. John B. Poersch, stated that the People were finally ready to re-try this case.

7. By Notices of Motion dated February 18, 1983 and February 25, 1983, I moved before Judge Strobel for dismissal of the indictment upon the grounds of (1) double jeopardy, (2) violation of my statutory and constitutional right to a speedy trial, and (3) in the furtherance of justice.

8. On January 18, 1984 Judge Stroebel issued a decision and order denying my motions in all respects and directing respondent Poersch, the District Attorney, to reschedule the case for trial at the earliest opportunity. A copy of the decision and order is annexed hereto as Exhibit C.

9. Respondent Poersch has already sought to reschedule my case, and I would already have again come to trial except for the fact that my attorney has previous trial engagements which preclude an immediate trial.

10. No previous application for this relief has been made except for the motion made to the County Court, referred to above.

11. I respectfully urge that a judgment of prohibition be issued, and that the indictment be dismissed, upon the grounds

(A) that to re-try me would be to subject me to double jeopardy, since

(1) there was no "manifest necessity" for the declaration of mistrial,

(2) the jury had not "deliberated for an extensive period of time" as required by CPL 310.60 (subd 1 [a]),

(3) the jury was not polled, and there is no way to tell whether there was agreement upon a partial verdict which may have included acquittal of one or more of the counts submitted for the jury's consideration, and

(B) retrial after a lapse of 14 months between the end of the first trial and the time the District Attorney again announced he was ready to try my case would deprive me of my right to a speedy trial, since the delay in reaching the case for retrial violates my speedy trial rights pursuant to CPL 30.20, Civil Rights Law §12, and the Constitution of the United States.

(C) retrial after this lapse of time would not be in the interest of and furtherance of justice.

WHEREFORE, your petitioner respectfully prays for a judgment under Article 78 of the CPLR prohibiting respondents from re-trying petitioner for the crimes for which he has already been tried, and dismissing Indictment No. 181-40 with prejudice, and for such other and further relief as may be just, proper and equitable.

Dated: February 22, 1984

/s/ STEVEN OWEN

State of New York,
County of Rensselaer, ss:
City of Troy,

STEVEN OWEN, being duly sworn, deposes and says:

I am the petitioner in the proceeding herein; I have read the foregoing petition and know the contents thereof and the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon informa-

tion and belief, and that as to those matters deponent believes them to be true.

/s/ STEVEN OWEN

Sworn to before me this
22nd day of February, 1984.
KATHLEEN M. DOLAN
Notary Public, State of New York
Residing in Albany County
My Commission Expires March 30, 1985

Appendix G—Excerpts from Minutes of Trial in County Court, Schenectady County, Dated October 30-31, 1981.

Supplemental Charge

(1125) but I will if you want me to.

Mr. Cheeseman: Whatever your pleasure is.

The Court: I'll tell you what I'll do. I'm going to ask them to stick around for about maybe until 4:00 o'clock. It's now 3:00 o'clock, and then if it's—we'll decide after that. All right. Now, if the jury requests any of this evidence I'll send it in. All right. You may retire and begin your deliberations.

(The jury was excused to begin deliberations.)

(Back in the Courtroom at 5:00 o'clock p.m.)

The Court: All right. Let the record show the jury has returned and are in their respective seats. Mr. Cheeseman is here representing the Defendant, and Mr. Carney is here representing the District Attorney. Mrs. Fiore, I understand that you have sent word out that the jury can not agree; is that correct?

The Forelady: Um-hum.

The Court: Ladies and gentlemen, as you all know the purpose of a trial is to search for the truth. Therefore, if it's at all possible it's desirable that a jury should reach a verdict one way or the other. (1126) Now, I'm not suggesting for one minute that you should agree on a verdict that you do not consider to be a just verdict, but I am suggesting that you attempt to resolve your differences and agree on a proper verdict that is in accordance with your findings of fact and the law as I have explained it to you.

You recall that when you were selected as jurors you took a solemn oath you would decide this case on the evidence or lack of evidence alone. You swore that you would apply the law to the facts even though you may not like the law or you may disagree with it. You swore that you would be completely objective in arriving at your final determination. That is what you said you would do. You swore that you would put aside all passion, all prejudice, all bias in arriving at your final determination on the counts in this indictment.

You swore that if you had a reasonable doubt on a relative point or material element or on the evidence or lack of it and one or more of your fellow jurors questions you about it you would be willing and able to give him what you believe is a fair, calm explanation for your position based upon the evidence or the lack of evidence, and finally you swore that no matter how you (1127) stood before the final determination before making up your mind on any count if you found out some evidence, some evidence that could look like you were wrong in your standard you would not hesitate to change your position.

Now, I'm going to ask you to go back into the jury room and once again review this evidence. Go over the testimony of each witness sensibly, weigh it carefully, discuss it calmly and dispassionately. Listen to the views and the arguments of your fellow jurors. This is what we mean by deliberations.

Now, please do not close your ears, and do not shut your minds. Do not shut out these views and arguments. It may be that one of your fellow jurors may recall some portion of the evidence which inadvertently you overlooked. This may or may not affect your decision in this case.

Reason, look, discuss the law, and then apply the laws as I have explained it to you. I'm asking you now as a good citizen to be mindful of your oaths that you took as

jurors. Being under oath you must continue—or you were under oath to deliberate in this court until there are no further deliberations warranted in this case. This does not mean every decision must be (1128) made by you.

It does not mean that a verdict must be reached, but it does mean that every effort should be made by you consistent with your conclusions to arrive at a verdict. This case has taken two full weeks, a lot of time and effort. The parties here, if it is at all possible, are entitled to have you arrive at a verdict.

Now, I'm going to ask you to go back and see whether you can come to such an agreement, and I ask you to return to your jury room for that purpose. Now, if the Court can be of any help to you please do not hesitate to send whatever request you may wish concerning this trial. Now, I'm going to let you deliberate until 6:00 o'clock, and then if you haven't reached a verdict I'll send you out to dinner, and you can come back and resume your deliberations at that time.

All right. I'll ask you to return to your jury room, and please do your best to arrive at a verdict and deliberate among yourselves, listen to the views of the other people. Any exception, Mr. Cheeseman, to the charge?

Mr. Cheeseman: My response first, Judge?

(1129) The Court: Do you have any exception?

Mr. Carney: I have none, Your Honor.

Mr. Cheeseman: No. I don't think so, Judge.

The Court: All right, ladies and gentlemen. Please return and continue your deliberations.

(Deliberations continued)

(Back in Courtoom at 5:45 p.m. o'clock)

The Court: Let the record show that the jury has returned with a question. Defendant is in Court with his attorney, and Mr. Carney is here for the District Attorney's office.

Ladies and gentlemen, I have a note from the Forelady here that says that you would like to hear Michael Dougherty's testimony, but I understand you're only interested in the testimony from the time he left the Grinch until the time of the accident. Is that true?

The Forelady: Yes.

The Court: All right. Now, do you want the Cross-Examination about that?

Juror No. 2: I would like to hear the Cross-Examination of just in the beginning, first ten minutes or so. I believe he mentioned something there. (1130) The Court: First ten minutes was about the Corn Fest, wasn't it?

Juror No. 8: Could we listen to Nancy Grange's testimony when she got to the Grinch?

The Court: Sure. Now, give me everything you want to hear because I'm going to send you out to dinner because it's going to take her some time to find it.

Juror No. 2: I can give you specifically the conversation I want to hear, if I'm allowed to say it. It's about to the point where he contradicts himself to the point of where the car was parked in the driveway, from one point to the next. He said Mrs. Owen's car was in the driveway, and then when he was cross-examined he said it wasn't in the driveway. There's direct examination where he said the car was in the driveway, cross-examination he said it wasn't.

The Court: Well, you know what the conversation was.

Juror No. 1: There's others that disagree.

A Juror: Where did Dougherty say that he heard that he—they asked him if Steven Owen was driving. (1131) He said, "Yes."

The Court: Now, you want to know some conversation about the driveway up at Balltown Road. Now, what else do we want?

A Juror: I want Nancy Grange's testimony once she arrived at the Grinch.

The Court: Get the direct. If he wants the cross he'll get that. Anybody else need anything? So, we can swing right into it. All right.

Ladies and gentlemen, I'm going to send you out to dinner. The two court attendants will take you out. Same admonitions again. You're not to discuss this matter with anybody or among yourselves while you're out to dinner. You can discuss it all you want when you get back here, and if anybody tries to engage in conversation you tell them you're sorry, you're on the jury, and if they insist get their name and report back to me. When they return from dinner, Julie, they are to go in the jury room and continue their deliberations. I would assume that they would be back here about 7:30, quarter of eight, so, Mr. Cheeseman, you want to make your arrangements, be back here around 7:30, and you too, Mr. Carney, and I'll try to get back at 7:30, too. Have a good dinner.
(1132) No cocktails.

(Court was adjourned for dinner at 6:10 p.m. o'clock)

(The jury reconvened their deliberations at 7:30 p.m. o'clock)

Evening Session

(Back in the Courtroom at 8:35 p.m. o'clock)

The Court: Now, ladies and gentlemen, better let the record show the jury has returned from dinner, and the

Defendant is in Court with his attorney, Mr. Cheeseman. Mr. Carney is here representing the District Attorney's office.

Ladies and gentlemen, when we adjourned for dinner there was some testimony that you wanted read back. Now, what do you have on the top that you can read first?

(The Reporter read back the testimony of Philip Buttling's Direct Examination beginning from Page 475 Line 16 and ending on Page 478 Line 25 and also his Direct testimony beginning from Page 483 (1133) Line 3 and ending on Page 484 Line 23 with the exception of any objections that were made.)

(The Reporter read back the testimony of Michael Dougherty's Direct Examination beginning from Page 344 Line 24 and ending on Page 348 Line 2 and also his Direct testimony beginning from Page 350 Line 22 and ending on Page 370 Line 12 with the exception of any objections that were made.)

The Court: All right. Nancy Grange—somebody wanted the testimony of what she said, what happened when she left.

(The Reporter read back the testimony of Nancy Grange's Direct Examination beginning from Page 292 Line 15 and ending on Page 298 Line 13 and also her Direct testimony beginning from Page 307 Line 18 and ending on Page 310 Line 25 with the exception of (1134) any objections that were made.)

The Court: Is that enough, ladies and gentlemen?

The Jury: Yes.

Mr. Cheeseman: May I approach the Bench, please?

(Discussion at the Bench)

The Court: Now, have you got Suriano's testimony? Let's see, he was on the stand for about a whole day.

A Juror: How about the time when they asked for the blood, the reason why he asked to take one person's blood rather than three people's blood, the test—up around that area.

The Court: Well, see if you can find it. You go back and continue your deliberations, ladies and gentlemen. We'll have to ask her to find it. After all she's got two weeks of testimony here. She can't go down in a minute and say, "This is it." She has to read it all through and find out the question you're asking. Now we know what you're asking. Now, you wanted something about where he ordered the hospital to take a blood sample?

A Juror: Basically.

(1135) The Court: Why did they take a blood sample?

Juror No. 2: If they indicated during the testimony Steven Owen was the driver of the car.

Juror No. 8: Why did he ask for Steven Owen's blood was the main thing.

Mr. Cheeseman: Your Honor, if my recollection is correct it was Mr. Torre, Juror No. 2, who requested certain testimony be re-read concerning where the Owen Vehicle, the '79 Camaro, was when they returned from the Corn Fest, and I'll stand on the record as it's been re-read, but I would say that on Direct testimony there's a severe contradiction from what the witness said on his Cross-Examination.

On the Direct Examination in answer to questions put to the witness, Dougherty, by the Assistant District Attorney, he was asked these questions:

> "Which car is that? Answer: The new 1979 Camaro. Question: Where was that parked? Answer: In the driveway facing the garage door. And where was that in relation to the front door, the door leading into the laundry room which you

had entered? The laundry room would be—(1136) it's a two-car driveway and a two-cell ga age. To the left of the left-hand garage door is the laundry room door."

I think that clearly contradicts what the witness said on his Cross-Examination, and I would respectfully ask, and I did at the Bench, ask you to have that portion re-read since that would have been the part of what the—

The Court: The juror said he had heard enough of the testimony and he stopped. So I'm not going to change it, but you may have your exception to it.

(The jury was excused to continue deliberations)

The Court: All right, Mr. Cheeseman. Go ahead.

Mr. Cheeseman: Your Honor, I'd just like the record to reflect although I have taken no objection to the manner in which the jury deliberations have been going on I think if there are any further questions that the jurors might have I would ask that the jurors be instructed to put them in writing so that they can be delivered to the Court and the Court—

(1137) The Court: They have been instructed, and they do except when they are all in here. There's no sense in them going in there and writing it down when they can say it on the record, but you can note your objection.

Mr. Carney: Off record.

(Discussion off the record)

Mr. Cheeseman: It almost seems to me that we are taking an active part in the deliberation.

(Court recessed)

(Back in the Courtroom at 9:35 p.m. o'clock)

The Court: Bring in the jury. All right, Mrs. Ronan. Will you please read what you found in regard to Sergeant Suriano's testimony that was requested by the jury?

(The Reporter read back the testimony of Louis Suriano's Direct Examination beginning from Page 110 Line 18 and ending on Page 111 Line 19 with the exception of any objections that were made.)

The Court: All right. You may retire and continue your deliberations.

(The jury was excused to continue (1138) deliberations)

(Back in the Courtroom at 10:30 p.m. o'clock)

The Court: All right. Let the record show the jury has returned and are in their respective seats. The Defendant is in Court with his attorney, Mr. Cheeseman. Mr. Carney is here representing the District Attorney's office.

Ladies and gentlemen, it's getting late. You have been here since sometime around 9:30 this morning, and it's been a long day. You obviously have not yet reached a verdict. I'm going to send you out for the night, sequester you in a motel for the night. I'll ask the Sheriff to assign the usual guards to see that these good people get a good night's sleep. I'll ask you to see that they get up in the morning in time to have breakfast and return here by 9:30 so that they can return to their deliberations. So, is there some period of time you need to get somebody to get them over.

Sheriff Waldron: Yes, Your Honor.

The Court: You probably have to call a motel and tell them they are on their way.

Sheriff Waldron: Yes, sir.

The Court: You do that and see if you (1139) can get them over there as soon as possible so that they can get a good night of sleep. All right?

Sheriff Waldron: Yes, sir.

The Court: In the meantime we'll recess until tomorrow morning at 9:30, and now again I'm going to caution you, ladies and gentlemen, that you are not to discuss this tonight while you're over there, and I think that maybe tomorrow we'll all return a little fresher, and you can start your deliberations again.

We'll stand in recess until 9:30 tomorrow morning. I'll now turn you over to the custody of the Sheriff to take you over to the motel. You can start preparing, and he'll have two people, or would you like Julie and Tony to take them over there and the guards meet you there?

Sheriff Waldron: May I call the hotel first and get the arrangements set up first, and we'll get them over?

The Court: You'll have to do that. We're in recess until tomorrow morning at 9:30, and you wait in the jury room, and the Sheriff will be over with his attendants to take you over to the motel.

(1140) (Whereupon the Court was recessed and the jury sequestered at the Holiday Inn of Schenectady, New York, until Saturday, October 31, 1981, at 9:30 a.m. o'clock.)

* * *

(1142) (Schenectady County Court, Saturday, October 31, 1981)

Proceedings

(Jury deliberations were continued at 9:30 a.m. o'clock)

(Back in the Courtroom at 9:55 a.m. o'clock)

The Court: Let the record show that the jury has returned and are in their respective seats. Good morning, ladies and gentlemen. The Defendant is in Court with his attorney, Mr. Cheeseman, and Mr. Carney is here representing the District Attorney's office.

Ladies and gentlemen, you have a couple of questions here. I'll see if I can answer them to the best of my ability. The evidence in this case comes from what you have heard from the witness stand and what you have seen as exhibits. The arguments and the opinions of counsel is not evidence. The indictment is not evidence.

Now, as far as the law is concerned, what I have told you about the law as far as you're concerned is the law. You must take the law from me as I give it to you whether you agree with it or not. You remember I said that I had a yellow pad here. You and I both know it's yellow, but if I tell you the law of the State of New York says that this pad is green, it's green.

(1143) Now, you must sift evidence as you have heard it and as you have seen it, and after you have done that you must take the law as I gave it to you and apply that to this evidence and in so doing come up with a just and fair verdict for both sides. All right?

Now, you want to know something about presumption of innocence. Every Defendant in any trial comes before the jury clothed by the law with a presumption of innocence. Coming here for a trial he is presumed to be innocent, and that presumption of innocence continues right through the trial and exists and accompanies you into the jury room.

That presumption is always there, and the only way it can be destroyed is by all 12 of you agreeing on the basis of the evidence that the Defendant is guilty. You can not find

the Defendant guilty by first disregarding the presumption or by saying or feeling he must be guilty. No. You must first start by saying he must be innocent, and only after this start, if the evidence which you accept and believe convinces you beyond a reasonable doubt that the presumption must be discarded and a verdict of guilty returned, only then is this presumption destroyed.

(1144) The fact that this Defendant did not testify in his own behalf if not a factor from which you may draw any inference which would be unfavorable to him. I think that answers your questions, ladies and gentlemen.

Yes, ma'am?

The Forelady: Your Honor, you said in the very beginning that we were to consider all the evidence and exhibits presented in this Courtroom?

The Court: Um-hum.

The Forelady: How does that apply to evidence not presented?

The Court: You can not take anything that is not presented.

The Forelady: Thank you.

The Court: Must be the evidence that has been presented to you. All right? You may return and continue your deliberations.

(Jury deliberations were continued)

Mr. Cheeseman: Judge, as I understand, one of the notes that came from the jury to you regarding the Defendant's failure to testify, I think, was I correct, did not in words or substance say, "Mr. Cheeseman did not prove that the Defendant was innocent."

(1145) I think in view of that portion of that note that also would require some type of an instruction that Mr. Cheeseman nor the Defendant have to prove anything in this case.

The Court: Well, you may be right.

Mr. Carney: We may have covered that with the presumption of innocence.

The Court: File the two notes in the record. Bring the jury back in.

(The jury was brought back into the Courtroom)

The Court: Ladies and gentlemen, since you returned to the jury room I re-read the note you sent out, and the note says that some say that Mr. Cheeseman didn't prove this Defendant innocent. Well, of course that is not the law as I have told you before. It's incumbent upon the District Attorney to prove each and every element of this crime beyond a reasonable doubt.

The Defendant does not have to prove anything. He's presumed to be innocent, and this burden of proving him guilty beyond a reasonable doubt rests and remains on the Prosecution throughout this entire trial. All right. You may—

Juror No. 2: Your Honor, can I ask you (1146) another thing? There was a statement made in there the other day to the affect he took the oath, he's gotta be telling the truth.

The Court: You don't want to get into that. The credibility of each witness, as I have told you, is for you, the jury, to determine. You are to determine who's telling the truth, who's not telling the truth, and you do it just like you do in your every day affairs. You figure a man is telling you the truth or whether he isn't. The question of whether or not to believe him is in the province of the jury.

Juror No. 2: But isn't it possible that somebody might not be telling the truth or forgetting something?

The Court: I'm not going to discuss the case. I've read the law to you. You are to determine who and what to believe. All right. You may return.

(Deliberations continued)

(Back in the Courtroom at 11:20 a.m. o'clock)

The Court: All right. Let the record show the jury has returned and are in their respective seats. The Defendant is in Court with his attorney, Mr. Cheeseman. Mr. Carney is here representing the Prosecution.
(1147) Madam Forelady, I have a note from you here which states, "This jury is deadlocked, and we can't come to a conclusion." Do you feel in your own minds that there is any possibility that you can reach a verdict? I want to be sure of that now because if there is a possibility if you think by further deliberations reviewing the evidence and the law and reasoning together that you can come to a verdict I want you to tell me now.

Juror No. 5: I don't think things can be reasoned out. It's beyond reasoning.

The Court: There are certain measures that are beyond reasoning with?

Juror No. 5: Exactly.

Juror No. 8: The same way we stood when we walked in at 4:00 o'clock. We stand that way. We have taken everything and dissected it. I think I'm a lawyer now.

The Court: Well, if you're positive that there's no possibility of reaching a verdict I'll declare a mistrial. I'll discharge the jury and replace the case on the ready calendar for retrial at the earliest opportunity. All right, ladies and gentlemen. Thank you very much for your services, and I thank you on behalf of (1148) myself and the County of Schenectady and the parties involved, too. You're discharged, and you may return home. Thank you very much.

I'll continue the Defendant on bail, place the case on the ready calendar for retrial.

(The jury was excused)

(Whereupon the proceedings were concluded)

Supreme Court, U.S.
FILED
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No. 85-316 (2)

IN THE

Supreme Court of the United States

October Term, 1985

STEVEN OWEN,

Petitioner,

v.

JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY,

and

HON. JOHN B. POERSCH, as District Attorney of Schenectady County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS.

PETITIONER'S REPLY BRIEF.

Respondent's argument that there is no conflict between the highest court of the State of New York and the highest courts of other states is logically fallacious. The argument

assumes that there is no possibility that a verdict of acquittal had been reached on any of the counts submitted to the jury. There is no basis for that assumption.

Respondent assumes, repeatedly, that the only issue upon which the jury could have been divided is the question of whether petitioner or another was driving the car at the time of the accident. However there are other issues which could have divided the jury.

For example, the jury might have decided that petitioner was the driver but have been undecided (1) whether he should be subjected to criminal liability at all, and (2) if so, for what level of intent. Thus the jury could have acquitted petitioner of the greatest charge, manslaughter in the second degree (New York Penal Law § 125.15), and have been deadlocked on the question of whether he should be found guilty of criminally negligent homicide (Penal Law § 125.10).

Respondent concedes "[u]nquestionably, when there is the possibility that a jury has acquitted on one or more of several counts, the prudent trial practice is to conduct a poll to determine which counts are susceptible of mistrial for want of jury agreement" (Br., p. 8). Respondent's distortion of the issues before the jury does not prove that such a possibility was not present in this case. There is nothing in the record which shows that there was no possibility that the jury had reached a partial verdict of acquittal.

It is constitutionally offensive to retry petitioner for any count for which he has already been acquitted by the first jury. There is nothing in the colloquy between the trial judge and members of the jury which shows how the jury was deadlocked.

Contrary to respondent's assertion, this case does not merely involve a question of interpretation of a New York statute which has no federal constitutional implications and is of no interest in other jurisdictions. This Court regularly examines state statutes to determine if they pass constitutional muster. The opinion of this Court in this case would give guidance to other states facing similar questions.

As the jury was not made aware that it could announce a partial verdict, it is irrelevant that no juror spoke out to state that a verdict had been reached on one or more of the counts. The jury had not reached a verdict on all the counts and evidently was not told that it had any alternative except to attempt to reach a unanimous verdict on each of the four counts.

Respondent cites several cases which purportedly stand for the proposition that general questioning of the jury is an acceptable alternative (Br., p. 11). Evidently respondent misperceives the issue. The cited cases state that it is not necessarily error for the court to discharge the jury without polling each juror as to whether he or she agrees that there is no reasonable possibility of agreement. The cases do not discuss the issue presented here: whether the jury should have been asked if there had been agreement that the defendant should have been acquitted of one or more of the counts submitted, even though the jury was not able to reach agreement on all counts (see *United States v. See,* 505 F.2d 845, 851 [9th Cir. 1974]; *Clemsen v. Municipal Court,* 18 Cal.App.3d 492, 96 Cal.Rptr. 126 [1971]; *People v. Caradine,* 235 Cal.App.2d 45, 44 Cal.Rptr. 875 [1965]). None of those cases contradict the cases cited on page 7 of the Petition.

Respondent declares that the issue which petitioner raises has been presented, and rejected in the federal courts (citing *United States v. Larry,* 536 F.2d 1149 [6th Cir. 1976]). Respondent errs. *Larry* involves the same issue discussed in the last paragraph, not the question raised by the present petitioner.

A direction from this Court that, in a multicount case, a jury must be polled before declaration of mistrial, would not impair the discretion of the trial judge. To engage in such questioning would be no more onerous a task than questioning a defendant as to whether a guilty plea is truly voluntary. The questioning would not risk coerced verdicts. After questioning the jury could be discharged with the defendant knowing whether or not he had been acquitted of any counts so that he could not be retried for those counts.

Respectfully submitted,

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IN THE

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JUDGE OF THE COUNTY COURT,
SCHENECTADY COUNTY,

and

HON. JOHN B. POERSCH, as District Attorney of Schenectady County,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM, 1985

NO. 85-316

STEVEN OWEN,

Petitioner,

v.

JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY,

and

HON. JOHN B. POERSCH, as DISTRICT ATTORNEY of SCHENECTADY COUNTY,

Respondents.

BRIEF OF RESPONDENT HONORABLE JOHN B. POERSCH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent Honorable John B. Poersch, as District Attorney of Schenectady County, New York, respectfully requests that this Court deny the Petition for a writ of certiorari, seeking review of the decision and order ("Remittitur") of the New York State Court of Appeals dated May 28, 1985 and reported at 65 N.Y.2d 658, 491 N.Y.S.2d 611.

OPINIONS BELOW

The Respondent is satisfied with the Petitioner's rendition of the "Opinions Below" with the exception that the subject opinion of the New York State Court of Appeals is correctly cited as reported at 65 N.Y.2d 658, 491 N.Y.S.2d 611.

JURISDICTION

The Respondent is satisfied with the Petitioner's rendition of the basic jurisdictional facts of this case to the extent that the petition is timely. The Respondent submits that no federal question presents itself for review.

STATUTES INVOLVED

This case is directly concerned with a construction of New York State Criminal Procedure Law Section 310.60 subd. 1(a) which provides as follows:

"Section 310.60. DISCHARGE OF JURY BEFORE RENDITION OF VERDICT AND EFFECT THEREOF.

1. A deliberating jury may be discharged by the court without having rendered a verdict only when:

(a) The Jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time;. . ."

QUESTIONS PRESENTED

1. Does the highest state court's construction of a state law regarding the proper exercise of a trial judge's discretion to declare a mistrial for want of jury agreement upon a verdict so directly effect a criminal defendant's assertion of a right to be free of double jeopardy as to raise an important issue for Supreme Court review?

2. Should the Supreme Court establish a rule to impose upon all trial courts a requirement that deadlocked jurors be polled to determine their failure to agree upon any verdict in a multi-count indictment trial before declaring a mistrial, which mistrial is otherwise inoffensive to the criminal defendant's right to be free from double jeopardy, and where the trial record would not warrant such a poll?

STATEMENT OF THE CASE

The Petitioner was brought to trial on an Indictment charging him with Manslaughter in the Second Degree, Criminally Negligent Homicide, Assault in the Second Degree and Assault in the Third Degree on October 16, 1981 before the Honorable George W. Stroebel, Jr., Schenectady County Court Judge. Selection of a jury commenced on October 16, 1981 and ended on October 19, 1981 after an intervening weekend. The case was submitted to the jury on October 30, 1981, on which date jury deliberations began at 3:00 p.m. At 5:00 p.m. the jury returned to the Court and informed the Court that it could not agree. The jury was then given supplemental instructions including an "Allen Charge" and returned to deliberation. At 5:45 p.m. the jury returned to the courtroom and requested that certain portions of the trial testimony be read to them, which portions concerned the substance of testimony and credibility of the prosecution witness, Michael Dougherty, who testified to having observed the petitioner operating the automobile immediately before the accident which resulted in the death to one passenger and serious injury to another. The jury was then sent to dinner and returned to its deliberations at 7:30 p.m. At 8:35 p.m. the requested portions of the trial testimony were read to the jury, the jurors asked additional questions of the Court, which the Court

answered, and the jury again resumed its deliberations. The jury returned to the courtroom at 9:35 p.m. for the reading of additional testimony and returned to deliberation immediately thereafter. At 10:30 p.m. the Court discontinued the deliberations of the jury and sequestered them for the night. On the following morning, October 31, 1981, at 9:30 a.m., the jury again returned to the courtroom seeking additional instruction. Instructions were given after which the jury again returned to deliberation. The jury was then interrupted for corrective instruction and returned to deliberation once more. At 11:20 a.m. the jury returned and the following colloquy ensued:

> THE COURT:. . .Madame Forelady, I have a note from you here which states, "This jury is deadlocked, and we can't come to a conclusion." Do you feel in your own minds that there is any possibility that you can reach a verdict? I want to be sure of that now because if there is a possibility if you think by further deliberations reviewing the evidence and the law and reasoning together that you can come to a verdict I want you to tell me now.
>
> JUROR NO. 5: I don't think things can be reasoned out. It's beyond reasoning.
>
> THE COURT: There are certain measures that are beyond reasoning with?
>
> JUROR NO. 5: Exactly.
>
> JUROR NO. 8: The same way we stood when we walked in at 4:00 o'clock. We stand that way. We have taken everything and dissected it. I think I'm a lawyer now.
>
> THE COURT: Well, if you're positive that there's no possibility of reaching a verdict I'll declare a mistrial. I'll discharge the jury and replace the case on the ready calendar for retrial at the earliest opportunity. All right ladies and gentlemen. Thank you very much for your services, and I thank you on behalf of myself and the County of Schenectady and the parties involved, too. You're discharged, and you may return

> home. Thank you very much. I'll continue the defendant on bail, place the case on the ready calendar for retrial.

After the foregoing, the jury was excused and the proceeding was concluded. Before the jury was discharged, the petitioner voiced no objection or exception to the declaration of mistrial. The jury was not polled and no partial verdict was received.

The matter was moved again for jury trial in January, 1983, at which time the petitioner brought on motions, by Notices of Motion dated February 18, 1983 and February 25, 1983, to dismiss the indictments on the ground that double jeopardy barred any retrial. A hearing on the motions was conducted on May 24, 1983 when the motions were submitted without argument. On January 18, 1984, the motions to dismiss were denied by Hon. George Stroebel, Jr., County Court Judge. Subsequently, the petitioner brought a CPLR Art. 78 proceeding in the Appellate Division, Third Department, by Order to Show Cause dated Appellate Division of the Supreme Court granted the writ by order dated August 27, 1984. The Respondent herein appealed to the New York State Court of Appeals upon the ground that the trial record did not support a finding of an abusive exercise of discretion in the trial judge's declaration of mistrial, as a matter of law. The Court of Appeals agreed, reversing the Appellate Division and vacating the writ of prohibition on the ground that no abuse of discretion was evident in the trial record. Its order ("remittitur") was dated May 28, 1985. This Petition ensues as a result.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THOSE OF OTHER STATE'S HIGHEST COURTS AS TO WHETHER THERE CAN BE RETRIAL OF A MULTI-COUNT INDICTMENT FOLLOWING THE DECLARATION OF MISTRIAL AND PURSUANT TO WHICH THE FIRST JURY WAS NOT POLLED ON EACH COUNT BEFORE BEING DISCHARGED.

The Respondent does not dispute the Petitioner's contentions that, in a criminal case, the prosecution may not relitigate issues of fact decided in the defendant's favor in a previous prosecution (*ASHE V. SWENSON*, 397 U.S. 436 (1970); et al) and that the constitutional provision against placing a criminal defendant twice in jeopardy for the same offense prohibits a second trial following an acquittal (*ARIZONA V. WASHINGTON*, 434 U.S. 497, 503, (1978); et al).

The Respondent does dispute the Petitioner's contention that a policy has arisen in a number of states whereby a jury, apparently deadlocked in its consideration of a multiple count indictment, must be polled to determine whether unanimity of agreement had been achieved regarding any single count. No such policy exists in the federal courts. To the extent the same factual situation, regarding the polling of juries deadlocked in their consideration of multi-count indictments, has arisen in the federal courts, certiorari has been denied. *UNITED STATES V. LARRY*, 536 F.2d 1149, cert. den. 429 U.S. 984. Unquestionably, when there is the possibility that a jury has acquitted on one or more of several counts, the prudent trial practice is to conduct a poll to determine which counts are susceptible of mistrial for want of jury agreement. It is, however, conceivable that trial situations may occur where there is no reasonable likelihood or possibility that jurors considering multiple counts may have agreed to a partial acquittal. In such situations the necessity of a jury poll would not present itself. The Respondent respectfully submits that the policies of all the jurisdictions cited by the Petitioner would encompass such a rationale. When the utility of the poll cannot be established, no purpose is served by polling a jury.

The case at bar is one in which a jury poll was rendered unnecessary by the nature of the deliberations. Throughout their deliberations the jury manifested its position, regarding all the charges of the indictment, to be one by which they were finding it impossible to resolve the simple issue of the credibility of the prosecution's chief eyewitness, Michael Dougherty, who testified that the defendant Petitioner had been the operator of the automobile immediately prior to and during the accident which resulted in death for the young, female passenger. That credibility issue was at the heart of any resolution of the central

and threshold issue in each of the offenses charged in the indictment: was the Petitioner the operator of the automobile at the time of the accident? To the extent the jury was unable to agree on whether or not the Petitioner was the operator of the car, they would necessarily be unable to agree on a verdict in any of the indicted charges. That precise and irreconcilable issue was the reason for the jury deadlock in the trial below. It was made apparent to the trial judge and to the parties by the substance of the testimony the jury asked to have reread during deliberations. It was the reason why the Petitioner, as the defendant, declined to request a poll of the jury after the jury's second announcement of deadlock and the reason the trial judge correctly determined that a poll of the jury was not necessary. (A full analysis of the jury's requests for the rereading of testimony was made a part of the Respondent's appeal to the New York Court of Appeals and, if necessary, will be a part of the Respondent's opposition here, if certiorari is granted).

It is respectfully urged that this Court need not and should not entertain the Petitioner's request that it provide "authoritative direction" as to whether or not a jury *must* be polled on each count of an indictment before a mistrial may be declared. No conflict among state jurisdictions exists as the petitioner suggests. Rather, the law regarding the polling of a deadlocked jury is clear and consistently applied to require a poll only where there is a possibility that the jury affected a partial acquittal. Since there was no reasonable possibility of partial acquittal in the trial below, no conflict exists on this issue between the decision of the New York Court of Appeals below and the policies of other state courts.

Here, the jury was polled generally as to their unanimity of deadlock. Since there was assent regarding deadlock from two jurors, including the forewoman, no dissent from the remaining jurors and nothing in the trial record to indicate even the possibility that a partial verdict had been or could have been reached, then the general questioning of the jury was an acceptable and proprietous alternative to an individual poll. *UNITED STATES V. SEE*, 505 F.2d 845, 852, cert. den. 420 U.S. 992; *CLEMSEN V. MUNICIPAL COURT*, 18 Cal. App. 3d 492, 96 Cal. Rptr. 126, 131-132 (Ct. of App., 1971); *PEOPLE V. CARADINE*, 235 Cal. App. 2d 45, 44 Cal. Rptr. 875, 878 (Ct. of App., 1965).

2. THE CASE BELOW SO TURNS ON ITS OWN FACTS THAT ANY REVERSAL WOULD BE PARTICULAR TO SUCH FACTS ALONE AND WOULD NOT AFFECT OTHER LITIGANTS.

This is a case that turns on its own facts and will not affect other criminal litigants. The trial judge became aware, throughout the course of the jury deliberations and as a result of their requests for the rereading of testimony, that they were deadlocking on a simple fact issue, the identity of the driver of the car, which itself turned upon an assessment of the credibility of the chief prosecution eyewitness, Michael Dougherty, vis-a-vis that of the theory put forth by the defendant. Each testified or presented testimony that the other was the driver. Before a verdict could be reached in any of the charged offenses, a resolution of that credibility issue was necessary. This point was not emphasized, although it was raised, in the People's opposition response to the defendant's petition for a Writ of Prohibition brought in the State's intermediate appellate court, the Appellate Division of the Supreme Court. The judges there based their decision to grant the writ on a strict, and somewhat simplistic construction of New York State Criminal Procedure Law Section 310.60(1)(a) and without the benefit of a careful, precise and emphatic analysis of the trial facts. As a result, the court granting the writ determined that the six hour deliberation period was "per se" inextensive, that the mistrial declared thereupon was without the requisite "manifest necessity" and was an abusive exercise of judicial discretion.

Upon appeal by the People to the New York State Court of Appeals, a close examination was made of the trial record upon which it was argued that, since the jury was apparently deadlocked on a single issue of credibility, six hours of deliberation, during which the jury was sequestered overnight and given an *Allen* charge (*ALLEN V. UNITED STATES*, 164 U.S. 492; 1 CJI 42.60), could not be considered "inextensive" as a matter of law and that it was within the sound exercise of discretion for the judge to declare a mistrial. The Court of Appeals so held, noting that no hard and fast rule regarding the sufficiency of the time taken by a jury in deliberation upon relatively simple issues can be established, but that the particular circumstances of each situation

must be taken into the proper analysis of such questions. The Court also held that a poll of the jurors was unnecessary in that, having received an explicitly negative response from two of the jurors when all were generally questioned and not a word of dissent from the others, the trial judge was justified in concluding that unanimity was unlikely within a reasonable period of extended deliberation.

Any decision from this Court which would work a reversal of that in the New York State Court of Appeals must, necessarily, address the propriety of basing a mistrial declaration in a multi-count indictment trial, in which no individual poll was conducted to determine the occurance of a partial acquittal, upon the import of the jury's requests for reread testimony, i.e. the jury's inability to resolve the credibility based threshold issue in each of the charged offenses: was the Petitioner the operator of the car? The likelihood of a similar situation arising to affect future criminal litigants is so small as to be negligible. Therefore, it is an issue which does not warrant an expenditure of this Court's valuable time and attention.

3. THE CASE BELOW TURNED UPON THE CONSTRUCTION OF A NEW YORK STATE STATUTE, CRIMINAL PROCEDURE LAW SECTION 310.60(1)(a), AND DOES NOT DIRECTLY INVOLVE A QUESTION OF CONSTITUTIONAL PROPORTION.

New York State Criminal Procedure Law Section 310.60 reads as follows:

Section 310.60. DISCHARGE OF JURY BEFORE RENDITION OF VERDICT AND EFFECT THEREOF.

> 1. A deliberating jury may be discharged by the Court without having rendered a verdict only when:
>
> > (a) The jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time; . . .(NEW YORK STATE LAWS 1970, c. 996, Section 1).

Although Section 310.60 was incorporated into New York's Criminal Procedure Law for the purpose of codifying double jeopardy protections, its interpretation is not binding in other jurisdictions. The court below rendered the decision being appealed primarily upon a construction of CPL Section 310.60(1)(a) and not upon any review or interpretation of federal codifications or federal court constructions of constitutional announcements regarding double jeopardy. Neither did it presume to interpret, directly, constitutional provisions against placing one twice in jeopardy for the same offense. The court below relied upon its previous decision in *PLUMMER V. ROTHWAX*, 63 NY2d 243, to hold that these six hours of deliberation could not constitute an "inextensive" period of deliberation per se, but must be considered in conjunction with the relatively simple threshold issue in each of the charged offenses which, itself, constituted an issue upon which a jury could shortly become deadlocked. The court below also held that the trial judge reasonably satisfied himself that agreement among the jurors would be unlikely within a reasonable period of continued deliberation by finding that the judge's general inquiry of the jury regarding their unanimity of deadlock was satisfactory to elicit from them their unequivocal declaration of deadlock. Thusly, the decision of the Court of Appeals directly construed CPL Section 310.60(1)(a) by analyzing the facts in the trial below in the light provided by the prescriptions of CPL Section 310.60 (1)(a) without reference to the implications regarding constitutional proscriptions against double jeopardy. As such, any pronouncement from this Court would, necessarily, effect a further construction of State law.

Although every state appellate court decision indirectly effects litigants' constitutionally based rights, whether they be general rights such as the right to due process or specific rights such as the right to be free of double jeopardy, the Supreme Court's jurisdiction in invoked to consider federal questions of law only where the state court's decision directly involves a litigant's constitutional rights. Here, the decision of the New York State Court of Appeals spoke only of the trial court's adherence to the discretion-guiding dictates of CPL Section 310.60(1)(a) and held only that the trial judge's exercise of discretion to declare a mistrial was in accordance with that

provision and, as a matter of law, not abusive. Since the only issue on appeal has always been the propriety of that exercise of discretion, in light of the prescriptions of CPL Section 310.60(1)(a), the matters of law determined below have always only concerned the construction of CPL Section 310.60 (1)(a) and its application and have never been directly concerned with any federal question.

4. A REVERSAL HERE WOULD REQUIRE THE ESTABLISHMENT OF A RIGID RULE GOVERNING DECLARATIONS OF MISTRIAL WHENEVER JURIES FAIL TO AGREE.

This Court has long held that the particular circumstances of each trial should govern decisions to declare mistrial for a jury's inability to agree upon a verdict. In *UNITED STATES V. PEREZ*, 27 Fed. Cas. 504, Fed. Cas. No. 16,033, affd. 9 WHEAT (22 U.S.) 579, 6 L. Ed. 165, the court stated "(T)his is a plain question of fact for them to decide. There was no intricate question of law in the case. A longer time ought to be afforded to the jury, where a case involved a great number of facts and points of law. It depends more upon the nature of the case than upon any settled rule that could be laid down for the discharge of the jury."

Likewise, this Court has stated that "(T)he guiding principles of the *PEREZ* decision. . .command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula." *WADE V. HUNTER*, 336 U.S. 684, 691; see also *UNITED STATES EX REL. WEBB V. COURT OF COMMON PLEAS*, 516 F.2d 1034; *BROWN V. HUGHES*, 483 F. Supp. 793, 796.

A decision to declare a mistrial is one best left to the discretion of the trial judge as the person most aware of the circumstances of the trial. *UNITED STATES V. SEE*, 505 F.2d 845, cert. den. 420 U.S. 992; *GORI V. UNITED STATES*, 367 U.S. 364, 368; *ILLINOIS V. SOMERVILLE*, 410 U.S. 458, 467.

The Petitioner prays for certiorari by asserting the need for an "authoritative direction" from this Court to the effect that juries *must* be polled on each count of an indictment before a mistrial may be declared. The creation of such a rule would

work a severe restriction of the trial court's necessarily broad discretionary powers. (*ILLINOIS V. SOMERVILLE*, 410 U.S. 458, 462) and would create a significant risk of coerced verdicts thus rendering criminal defendants more susceptible to oppressive process of law. *UNITED STATES EX REL. ANTHONY V. SIELAFF*, 552 F.2d 588, 590-591. The Court is respectfully urged to decline the opportunity to create rigid standards for trial practice where judicial scholarship has consistently deemed such formulae antithetical to the effective, case by case administration of justice.

5. THE COURTS HOLDING IN *RICHARDSON V. UNITED STATES* IS SOUND AND PRECULDES THIS APPEAL.

The Petitioner incorrectly asserts that this Court's holding in *RICHARDSON V. UNITED STATES*, 468 U.S. _____, 104 S. Ct. 3081, 82 L. Ed.2d 242 (1984), would permit a trial judge to terminate a trial at any time prior to the rendering of a jury verdict and for any reason without there then being a double jeopardy bar to reprosecution. On the contrary, *RICHARDSON* holds, merely, that the genuine failure of a jury to reach a verdict manifestly necessitates a mistrial and retrial and is not an event which would terminate jeopardy for the accused. As such, the *RICHARDSON* holding is consistent with the line of respected decisions on the subject of mistrial following the inability of a jury to reach a verdict which extend back over 160 years to *UNITED STATES V. PEREZ*, 9 WHEAT (22 U.S.) 579, in 1824. However, the Petitioner's misinterpretation of *RICHARDSON*, further highlights the fact that the decisions below turned upon a construction of the New York State statute, Criminal Law Section 310.60(1)(a), which would prescribe and delineate the nature of a "genuinely" deadlocked jury. The real issue presented by this case, first with the Petitioner's petition for a writ of prohibition in New York State's intermediate appellate court, the Appellate Division of the Supreme Court, and then again upon the Respondent's appeal of the grant of the writ to New York State Court of Appeals, has always been whether the trial court was abusive of its discretion in finding the trial jury to have become genuinely deadlocked as a premise for its declaration of

mistrial. In that decision and exercise of discretion the trial court was held to a strict adherence to the standard for determining genuine deadlock as it was codified in CPL Section 310.60(1)(a), such that the dispute has always been focused upon a construction of that State law. The parties here have never disagreed as to the constitutional double jeopardy implications of a mistrial declared upon a genuine jury deadlock. Therefore, the holding in *RICHARDSON*, consistent as it is with the long established rule that double jeopardy presents no bar to a retrial after mistrial for a genuine inability to reach a verdict, need not be reconsidered by the Court. The reconsideration of *RICHARDSON*, which the Petitioner proposes, is not a valid reason for granting a writ of certiorari.

CONCLUSION

As has been argued above, the decision of the New York Court of Appeals being appealed focused upon the Petitioner's contention that the trial judge had abused his discretion to declare a mistrial for the jury's inability to agree on a verdict. The court below emphatically disagreed, holding that the resolution of the primary issue, the identity of the driver of the car, which required an evaluation of the credibility of the chief prosecution witness, was not a complex but a relatively simple task upon which a jury could shortly become deadlocked. The court found that the deliberation period of six (6) hours was more than a sufficient deliberation period in such circumstances. Therefore, the court below reasoned, the judge's decision to declare a mistrial was amply and substantially justified as manifestly necessary and was not, as a matter of law, an abusive exercise of discretion. The rationale applied to the review of agency decisions based upon findings of substantial evidence is equally appropriate here. Here, the trial record itself provides substantial support for the court's position such that this case does not merit further review and the appellate function should be considered to have come to an end. WHITE, *SUPREME COURT REVIEW OF AGENCY DECISIONS*, 26 AD. L. Rev. 107, 110 (1974).

Finally, for all the reasons stated above, this case is not one which requires an exercise of the Supreme Court's extraordinary

and discretionary jurisdiction. The petition for a writ of certiorari should be denied since review is unnecessary.

Respectfully submitted,
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